Lim Moon Heng v The Government of Malaysia & Anor

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–197 OF 2000–II
ZAKARIA SAM JC
28 JANUARY 2002

Bankruptcy *— Capacity of bankrupt — Leave to travel — Authority to grant leave, whether vested in Inland Revenue Board or Official Assignee — Application to Inland Revenue Board — Certificate under s 104 of Income Tax Act 1967, whether valid — Whether only Bankruptcy Act 1967 applicable to adjudged bankrupt — Whether international passport was 'property' under s 2 of Bankruptcy Act 1967*

The plaintiff, a bankrupt, was granted leave to travel outside Malaysia by the Official Assignee. The plaintiff then instructed his advocates to write to the first defendant's agent, the Inland Revenue Board, to seek leave to travel outside Malaysia. His application was rejected purportedly under s 104 of the Income Tax Act 1967 ('the ITA'), unless certain conditions were fulfilled. The plaintiff pointed out that the ITA was only applicable to those who were not adjudged bankrupts and the ITA was therefore not applicable to the plaintiff who was an adjudged bankrupt. Therefore, according to the plaintiff, the Bankruptcy Act 1967 ('the BA') was the only appropriate legislation governing the affairs, interest and assets of the plaintiff, being an adjudged bankrupt. Thus, the certificate issued under s 104 of the ITA by the first defendant was void and invalid. The first defendant on the other hand submitted that the certificate issued under s 104 of the ITA was valid though the plaintiff was an adjudged bankrupt. The issue for determination of the court was who had the authority to grant leave to the plaintiff who was bankrupt.

Held, dismissing the originating summons with costs:

(1) Section 38(1)(c) of the BA was only applicable to a bankrupt who did not owe the Inland Revenue Board any tax. In such case, the Official Assignee was the full and final authority to grant leave to a bankrupt to travel abroad. However, where a taxpayer still owed tax to the Inland Revenue Board, or in a case where the Inland Revenue Board had filed a claim against the taxpayer with the Official Assignee, though the Official Assignee had granted leave to a bankrupt to go overseas, as in the instant case, the Director General of Inland Revenue Board, still retained, under s 104(1) of the ITA, the power to stop him from leaving unless he fulfilled certain conditions imposed therein (see p 503I–504A).

(2) The issuance of certificate under s 104(1) of ITA was one of the authorized modes to recover the tax due. Likewise, in a case where a bankrupt had settled his tax and granted leave by the Director General of the Inland Revenue Board to travel abroad, the bankrupt still, under s 38(1)(c) of the BA required the

approval of the Official Assignee for such trips if he still owed other claimants (see p 504B, D); *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677 followed.

(3) An international passport was not 'property' as defined under s 2 of the BA. Since the international passport was not vested in the Official Assignee, the first defendant still possessed the right to stop the plaintiff from leaving Malaysia unless he fulfilled the conditions stipulated (see p 504E, G); *In the matter of Lau Hieng Yee, a bankrupt* [2000] 1 MLJ 59 followed.

[Bahasa Malaysia summary

Plaintif, seorang bankrap, telah diberikan kebenaran untuk keluar daripada Malaysia oleh Pegawai Pemegang Harta. Plaintif kemudian telah mengarahkan peguambela beliau untuk menulis kepada ejen defendan pertama, Lembaga Hasil Dalam Negeri, untuk memohon kebenaran untuk keluar daripada Malaysia. Permohonan beliau telah ditolak di bawah s 104 Akta Cukai Pendapatan 1967 ('ACP'), kecuali jika syarat-syarat tertentu telah dipenuhi. Plaintif telah menekankan bahawa ACP hanya terpakai ke atas mereka yang tidak dihukum bankrap dan ACP oleh itu tidak terpakai ke atas plaintif yang merupakan seorang yang dihukum bankrap. Oleh itu, menurut plaintif, Akta Kebankrapan 1967 ('AK') adalah satu-satunya perundangan yang sesuai mengawal urusan, kepentingan dan aset plaintif, yang merupakan seorang yang dihukum bankrap. Oleh demikian, sijil yang telah dikeluarkan di bawah s 104 ACP oleh defendan pertama adalah terbatal dan tidak sah. Defendan pertama sebaliknya telah menghujahkan bahawa sijil yang telah dikeluarkan di bawah s 104 ACP adalah sah walaupun plaintif seorang yang dihukum bankrap. Persoalan untuk ditentukan oleh mahkamah adalah siapakah yang mempunyai kuasa untuk memberikan kebenaran kepada plaintif yang merupakan seorang bankrap.

Diputuskan, menolak saman pemula dengan kos:

(1) Seksyen 38(1)(c) AK hanya terpakai ke atas seorang bankrap yang tidak terhutang apa-apa cukai dengan Lembaga Hasil Dalam Negeri. Dalam kes demikian, Pegawai Pemegang Harta merupakan pihak berkuasa yang tepat dan muktamad untuk memberikan kebenaran kepada seorang bankrap untuk keluar negara. Namun begitu, di mana pembayar cukai masih terhutang cukai kepada Lembaga Hasil Dalam negeri, atau dalam kes di mana Lembaga Hasil Dalam Negeri telah memfailkan satu tuntutan dengan Pegawai Pemegang Harta terhadap pembayar cukai, walaupun Pegawai Pemegang Harta telah memberikan kebenaran kepada seorang bankrap untuk keluar negara, sebagaimana dalam kes ini, Ketua Pengarah Lembaga Hasil Dalam Negeri, masih kekal, di bawah s 104(1) ACP, mempunyai

kuasa untuk menghalang beliau daripada keluar negara kecuali beliau telah memenuhi syarat-syarat tertentu yang dikenakan ke atas beliau (lihat ms 503I–504A).

(2) Pengeluaran sijil di bawah s 104(1) ACP adalah salah satu daripada cara yang diberikan kuasa untuk mendapatkan cukai yang terhutang. Begitu juga, dalam kes di mana seorang bankrap telah menyelesaikan cukai beliau dan telah diberikan kebenaran oleh Ketua Pengarah Lembaga Hasil Dalam Negeri untuk keluar negara, si bankrap tersebut masih, di bawah s 38(1)(c) AK dikehendaki mendapatkan kelulusan Pegwai Pemegang Harta untuk perjalanan sedemikian jika beliau masih terhutang dengan pihak-pihak menuntut yang lain (lihat ms 504B, D); *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677 diikut.

(3) Pasport antarabangsa bukan merupakan 'harta' sebagaimana yang ditafsirkan di bawah s 2 AK. Memandangkan pasport antarabangsa tidak diberikan kuasa di bawah Pegawai Pemegang Harta, defendan pertama masih mempunyai hak untuk menghalang plaintif daripada meninggalkan Malaysia kecuali beliau telah memenuhi syarat-syarat yang dinyatakan (lihat ms 504E, G); *In the matter of Lau Hieng Yee, a bankrupt* [2000] 1 MLJ 59 diikut.]

Notes

For cases on capacity of a bankrupt, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1598–1611.

Cases referred to

Lau Hieng Yee, In the matter of, a bankrupt [2000] 1 MLJ 59 (folld)
Tai Choi Yu v Government of Malaysia & Ors [1994] 1 MLJ 677 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 2, 8(1), 24(4), 38(1)(c), 58, 71, 72, 73
Income Tax Act 1967 s 104(1)

Anthony Bong (*Satem, Chai & Dominic Lai*) for the plaintiff.
Richard Foo (Inland Revenue Board) for the first defendant.
Ko Fui Long (Official Assignee Department) for the second defendant.

Zakaria Sam JC: The plaintiff took out this application by way of an originating summons to seek the determination and declaration of the court on the following questions:

(1) that the Income Tax Act 1967 ('the ITA') is only applicable to persons who are not adjudged bankrupts and the ITA is therefore not applicable to the plaintiff who is adjudged bankrupt, and that the Bankruptcy Act 1967 ('the BA') is the only appropriate legislation

governing the affairs, interests and assets of the plaintiff being an adjudged bankrupt;

(2) that the first defendant by submitting their claims for unpaid income tax revenue from the plaintiff to the second defendant, has subrogated its jurisdiction over the plaintiff to the second defendant, and that the second defendant under ss 8, 24(4) and 58 of the BA has jurisdiction over all affairs respecting the assets and interests of the plaintiff;

(3) the first defendant has therefore no right or jurisdiction to restrict or hinder the plaintiff's freedom of movement as guaranteed by the Federal Constitution by prohibiting the plaintiff from traveling freely out of Malaysia under s 104 of the ITA;

(4) that the first defendant shall, with immediate effect, annul the certificate issued under s 104 of the ITA against the plaintiff in order to allow the plaintiff to travel freely out of Malaysia without any conditions.

At the hearing of the application, the second defendant herein informed this court that it had given its sanction to the plaintiff to take up this application as neither the property nor the estate of the plaintiff is involved.

Brief facts

The plaintiff was adjudged a bankrupt on 30 November 1987 under Bankruptcy Proceedings No 285/86. As the plaintiff had various business contacts overseas, the plaintiff applied to the Official Assignee, Kuching for leave to travel outside Malaysia and leave was granted by a letter dated 20 November 1998, and a bank guarantee of RM50,000 was furnished by Citiloan Mortgage Sdn Bhd as security.

The plaintiff, after being granted leave by the Official Assignee, Kuching to travel out of Malaysia then instructed his advocates M/s Goh & Partners to write to the first defendant's agent, the Inland Revenue Board, to seek leave to travel outside Malaysia. His application was rejected purportedly under s 104 of the ITA, unless the following conditions could be fulfilled:

(a) that the income tax assessment of RM197,140.09 is settled in full; or

(b) a bank guarantee of RM200,000 is furnished.

It is contended that the first defendant has no authority to restrict the plaintiff's right to travel out of Malaysia. This is based on the fact that once a person is adjudged a bankrupt under s 8(1) of the BA, the official assignee shall be the receiver of any property and no creditor with respect to any debt shall have any remedy against the property of the adjudged bankrupt in respect of the debt. It was further explained that by virtue of ss 24(4) and 58 of the BA, the property of an adjudged bankrupt is vested in the official assignee. Since the first defendant, through its agent, had filed a proof of debt with the official assignee, the status of the first defendant is the same as any other creditors of the plaintiff. As such, under ss 8, 24(4), 58, 71, 72 and 73 of the BA, the official assignee has control over the estate of the

plaintiff and the first defendant's agent therefore has no authority to intervene by issuing a s 104 certificate under the ITA. The plaintiff being an adjudged bankrupt, the said certificate, therefore, should be issued against the official assignee being the receiver and manager of the plaintiff's estate.

In short, the plaintiff pointed out that the ITA is only applicable to those who are not adjudged bankrupts and the ITA is therefore not applicable to the plaintiff who is an adjudged bankrupt. The BA is the only appropriate legislation governing the affairs, interest and assets of the plaintiff, being an adjudged bankrupt. Thus, the certificate issued under s 104 of the ITA by the first defendant is void and invalid.

The first defendant on the other hand submitted that the certificate issued under s 104 of the ITA is valid though the plaintiff is an adjudged bankrupt.

Findings

There is no doubt that the plaintiff was caught in a very difficult and awkward situation where the official assignee had granted him leave to travel out of Malaysia but was barred from leaving by the first defendant unless he settled his debt in full or furnished a bank guarantee to the amount of RM200,000.

The pertinent question here is — who indeed has the authority to grant the said leave to the plaintiff who is a bankrupt? In order to answer this question, one has to look at the wordings of s 38(1) of the BA and s 104(1) of the ITA respectively.

The authority of the official assignee to grant the said leave is provided under s 38(1)(c) of the BA which reads:

> Where a bankrupt has not obtained his discharge the bankrupt shall not leave Malaysia without the previous permission of the official assignee or the court.

The first defendant on the other hand is conferred with such authority under s 104(1) of the ITA which reads:

> The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying:
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> (a) all tax payable by him (whether or not due or due and payable);
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> (b) all sums payable by him under s 103(4), (5), or (5A); and
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> (c) all debts payable by him under s 107A(2) or 109(2), or 109B(2)
>
> may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

After careful perusal of both provisions, I am of the opinion that s 38(1)(c) of the BA is only applicable to a bankrupt who does not owe the Inland Revenue Board any tax. In such case, the official assignee is the full and final authority to grant leave to a bankrupt to travel abroad. However, where a

taxpayer still owes tax to the Inland Revenue Board, or in a case where the Inland Revenue Board has filed a claim against the taxpayer with the official assignee, though the official assignee had granted leave to a bankrupt to go overseas, as in the instant case, the Director General of Inland Revenue Board, still retains, under s 104(1) of the ITA, the power to stop him from leaving unless he fulfilled certain conditions imposed therein.

The issuance of certificate under s 104(1) of ITA is one of the authorized modes to recover the tax due as was held by the Supreme Court in the case of *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677 that (at p 682):

> One of the primary function of the Director General of Inland Revenue under the Act is to collect and recover assessed tax effectively, and to do that, he must employ all the modes of recovery authorized in Pt VII (ss 103–111) of the Act. Action under s 104 is one of the authorized modes. It is the requirement of s 103 of the Act that a person pays his assessed tax on the service of the notice of the assessment on him failing which the Director General of Inland Revenue may besides using all other authorized modes, proceed to recover in court the assessed tax as a debt due to the Government and if judgment is obtained, to execute the judgement.

Likewise, in a case where a bankrupt had settled his tax and granted leave by the Director General of the Inland Revenue Board to travel abroad, the bankrupt still, under s 38(1)(c) of the BA requires the approval of the official assignee for such trips if he still owes other claimants.

My finding that the Director General of the Inland Revenue Board has the power to stop the plaintiff from leaving Malaysia is further fortified by the fact that an international passport is not property as defined under s 2 of the BA, where it was held in *In the matter of Lau Hieng Yee, a bankrupt* [2000] 1 MLJ 59.

> In our case, the international passport of the applicant cannot be turned into an asset for payment of debts to the creditors. So I am of the view that the international passport of the applicant does not come within the ambit of the definition of 'property' under s 2 of the Bankruptcy Act. As such, s 24(4) of the Bankruptcy Act has no application. In other words, the international passport of the applicant does not vest in the official assignee.

Since the international passport is not vested in the official assignee, the first defendant still possess the right to stop the plaintiff from leaving Malaysia unless he fulfilled the conditions stipulated, ie to pay the debt in full or pay a deposit of RM200,000.

On the above grounds, it is abundantly clear that the question as to which of the two Acts take precedent over the other does not arise. The two laws have their distinct applications. The ITA was enacted to regulate the collection of revenue of the country, and the BA to protect the creditors' interests. It is not wrong to say that these two Acts are both complementary and yet independent of each other. Therefore, it is only prudent for these two bodies to give due regard to their respective roles and responsibilities and to coordinate their decisions in order to avoid any unpleasant situations, as happened in this case.

Conclusion

For the reasons as given above, the originating summons is hereby dismissed with costs.

Originating summons dismissed with costs.

Reported by Ezatul Zuria Azhari